BRIEF

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No. 389

In the

Supreme Court of the United States

OCTOBER TERM, 1961

JIM SIMMONS,
Petitioner,

v.

UNION TERMINAL COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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JIM SIMMONS,

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v.

UNION TERMINAL COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 266-269), affirming the judgment of the United States District Court for the Northern District of Texas, is reported in *Simmons v. Union Terminal Company, 5 Cir. 1961, 290 F. 2d 453*, and is attached hereto as Appendix A.

QUESTIONS PRESENTED

Whether this Court will grant certiorari to review the decision of the district court, committed to its discretion by *Rule 49(a), Federal Rules of Civil Procedure*, to submit a

case to the jury on special issues, when such submission is full and fair, the losing party did not preserve any objections to the charge or the special issues, and the answers to the special issues are supported by the evidence.

Whether this Court will grant certiorari to review well settled principles relating to the admissibility of evidence for the limited purpose of impeachment.

CONSTITUTIONAL PROVISIONS, STAUTES, AND RULES

Although this case was brought under the Federal Employers' Liability Act, *45 U. S. C. §§ 51 et seq.* (hereinafter called the "F.E.L.A."), the construction of the provisions of that statute is not in issue. Since Petitioner was not denied a jury trial, the Seventh Amendment to the Constitution is not involved. In addition to *Rule 51, Federal Rules of Civil Procedure*, copied in Appendix D to the Petition, *Rule 49(a) Federal Rules of Civil Procedure*, is relevant to this case, and it is printed in Appendix B hereto.

STATEMENT

Since the Petition for Certiorari does not outline the evidence, the following brief statement is submitted.

The accident which is the subject matter of this suit occurred on a ramp, owned by Respondent, that runs between the railroad tracks leading to the Union Terminal, Dallas, Texas (R. 25).

This ramp is used for loading and unloading trains by both Respondent and Railway Express Agency, Inc. (R. 31). It is twelve feet wide (R. 227) and slopes two or three inches from its center, toward the tracks on each side, to allow water to drain from it (R. 35, 84). Such a slope is customary (R. 226-227) and, as Petitioner himself admitted, necessary so that standing water will not cause the ramp to become slick (R. 85).

Petitioner's case was that, while performing his duties as as an employee of Respondent, he stepped off a mail truck, and an Express wagon, without warning, rolled into him, knocked him to the track below, and turned over on him (R. 31). However, an employee of Railway Express testified that he had parked the Express wagon against a post in such a way that it could not roll and that Petitioner himself moved the wagon away from the post, turned it into such a position that it could and did roll down the slope toward the tracks, and, while attempting to catch it, was pulled underneath it by its weight and pinned below it when it fell from the ramp (R. 207).

The case was submitted to the jury on special interrogatories as provided for by *Rule 49(a), Federal Rules of Civil Procedure*, and the jury found no negligence on the part of Respondent. Petitioner does not now deny that their verdict was amply supported by the evidence. Judgment was entered on it, and the judgment was in all respects affirmed by the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

Although this action arose under the F.E.L.A., it is simply another of the thousands of negligence cases that each year are resolved by the trier of fact from conflicting evidence. This case the jury happened to decide in favor of the defendant. Petitioner has not been denied a jury trial.[1] He has had a jury trial, conducted in strict accordance with *Rule 49(a), Federal Rules of Civil Procedure.* It is apparent that he seeks relief from this Court, not because he was denied his jury trial, but because he did not win it.

Unable to complain that the Court took the case from the jury, unable to assert that the jury's verdict was wrong, Petitioner has levelled his main attack upon the court's charge.[2] In the district court, his complaint was that the court declined to give a general charge[3] but instead submitted the case upon special interrogatories, accompanied by appropriate instructions, in compliance with *Rule 49(a), Federal Rules of Civil Procedure.* That position, of course, is plainly without merit. Certainly, it is not supported by *Arnold v. Panhandle and S. F. Ry. Co., 1957, 353 U. S. 360, 77 S. Ct. 840, 1 L. Ed. 2d 889,* the only case cited by Peti-

[1]Therefore, cases such as *Rogers v. Missouri Pacific R. Co., 1957, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493,* and the authorities cited on page 8 of the Petition, are not in point.

[2]He does not include the entire charge anywhere in his Petition for Certiorari, and it is copied herein as Appendix C. See also R. 240-247.

[3]As he urged in the only part of his Motion for New Trial that was directed to the charge: "The Honorable Trial Court erred in refusing to submit the case to the jury in a general charge as covered in Plaintiff's Requested Charge No. 1. The submission of the case on specific special issues, in accordance with state Court rules and practice, unduly restricted Plaintiff's right of recovery on the general theory of unsafe place and working conditions furnished by his employer and thereby deprived Plaintiff of a clear unrestricted and unabridged submission of the liberal provisions of the Federal Employer's Liability Act." (R. 250.)

tioner, which simply held that the general verdict and the special verdict there returned by the jury were not in conflict, as the Texas court had thought them to be. There is no requirement in the federal rules or in the cases that the trial court submit a case upon a general charge. The circuits are unanimous in holding, in accordance with the plain language of *Rule 49(a), supra*, that whether the verdict is to be on a general charge, special interrogatories, or a combination of both, is entirely within the sound discretion of the court. *S. S. Kresge Co. v. Holland, 6 Cir. 1946, 158 F. 2d 495; Ziegler v. Akin, 10 Cir. 1958, 261 F. 2d 88; McDonnell v. Timmerman, 8 Cir. 1959, 269 F. 2d 54; Clegg v. Hardware Mutual Casualty Co., 5 Cir. 1959, 264 F. 2d 152.*

For purposes of appellate review, Petitioner has expanded his contentions. He now says that the question before this Court is whether he received a full and fair jury trial upon a special issue charge that "limited the jury's consideration of employer negligence in failing to provide a safe-place-to-work to the one element of permissive use of its premises." (Petition for Certiorari, page 2.) The short answer is that the charge did not so limit the jury. One special issue [No. 3(b)] did indeed inquire whether Respondent was negligent in permitting Railway Express employees to use the ramp where Petitioner was working (of which there was slight, if any, evidence) (R. 243). The controlling issue in the case, however, was whether Respondent was negligent in permitting the Express wagon to be parked on the sloping ramp of its premises in such a position that it could roll

into Petitioner. This issue was fully and fairly presented to the jury by Special Issue No. 3(a).[4]

The charge was in all respects fair and correct, and Petitioner, in any event, is in no position now to object to any of its contents. When the district court presented the charge and special issues to counsel for both parties and gave them the opportunity to register objections thereto, counsel for Petitioner said that there were "no objections from this side" (R. 146) and then requested the court to give a general charge that counsel had drafted.[5] This the Court refused to do, and stated that the case would not be submitted on a general charge (R. 147). Then counsel for Petitioner stated that the charge did not "include every element that the jury might consider down here as to space, as to height, as to elevation" (R. 150). He did not advise the Court as to how these elements were to be included in the charge or as to how they were relevant to the case, and he does not so advise this Court now. Also, he made the general objection that there was "no submission of an issue on unsafe place" (R. 147). He made no further objections to the charge that are now material;[6] he did not direct any specific objection to

[4]Special Issue No. 3(a) read as follows: "Special Issue No. 3: Do you find from a preponderance of the evidence that the defendant Union Terminal Company was guilty of negligence which in whole or in part was a proximate cause of the accident in question in any one or more of the following respects: (a) In failing to furnish the plaintiff a reasonably safe place to work by permitting an Express wagon to be parked on the sloping ramp of its premises in a position to roll.

Answer: 'Yes' or 'No'.
Answer: 'No'.

[5]Petitioner has attached only excerpts from this hearing to his Petition. The entire colloquy may be found at R. 146-155 and is attached hereto as Appendix D.

[6]Petitioner's only other objections were an objection to the court's submission of proximate cause, which was sustained (R. 151-152); an objection to Special Issue No. 4(a), which issue was never answered (R. 153); and a request for a special instruction, which was granted. (R. 155.)

Special Issue No. 3; and he did not tender any proposed interrogatories for possible inclusion in the charge.

A litigant cannot obtain appellate review of his objections to a charge unless, in the trial court, he states "distinctly the matter to which he objects and the grounds of his objection." *Rule 51, Federal Rules of Civil Procedure.* It is not sufficient that he merely object to the use of special interrogatories, *Martin v. United Fruit Company, 2 Cir. 1959, 272 F. 2d 347,* or enter such a vague, general protest as an objection that "there is no submission of an issue on unsafe place." *Richfield Oil Corporation v. Karseal Corporation, 9 Cir. 1959, 271 F. 2d 709, cert. den., 1960, 361 U. S. 961, 80 S. Ct. 590, 4 L. Ed. 2d 543; Lloyd v. Thomas, 7 Cir. 1952, 195 F. 2d 486; Holliday v. Great Atlantic & Pacific Tea Company, 8 Cir. 1958, 256 F. 2d 297; Krug v. Mutual Ben. Health & Accident Ass'n., 8 Cir. 1941, 120 F 2d 296.* See also *Penn v. Glenn, 6 Cir. 1959, 265 F. 2d 911; Union Pacific R. Co. v. Bridal Veil Lumber Company, 9 Cir. 1955, 219 F. 2d 825, cert. den., 1956, 350 U. S. 981, 76 S. Ct. 466, 100 L. Ed. 849.* It was Petitioner's duty to make his objections to the charge "sufficiently specific to bring into focus the precise nature of the alleged error." *Palmer v. Hoffman, 1943, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645.* He did not comply with that rule during the trial, and he has not done so here. His Petition presents nothing for review.

Petitioner next seeks to have this Court review the ruling under which the district court permitted Respondent, for the limited purpose of impeachment, to elicit testimony from Petitioner that he was drawing $80.00 per week under the

sickness and disability provisions of the Railroad Unemployment Insurance Act. *45 U. S. C. §§ 351-367.*

Again, Petitioner has failed to set out the circumstances surrounding the ruling of which he complains, and they will be noticed briefly here.

At the beginning of the trial, counsel for Petitioner made an oral motion that Respondent not be permitted to "ask any questions in the presence of a jury pertaining to payment of railroad retirement benefits" to Petitioner. This motion was sustained (R. 15). During the course of the trial, however, there developed in the testimony a sharp conflict as to whether Petitioner was actually incapacitated by his injuries. Physicians called to the stand by Respondent testified that Petitioner was then able to do the same work that he had done prior to the accident and had been able to do that work since March 1958, almost two years before the trial (R. 130-131, 179, 183). On the other hand, Petitioner's medical witness testified that his injuries had so disabled him that he had not, and could not have, worked since the accident (R. 103-104). Secure, so he thought, in the protection of the court's ruling, Petitioner testified that he was unable to work and that, in the words of his counsel, he had not "drawn a day's wages of any kind" since he got hurt (R. 52-53). Accordingly, the Court reversed its prior ruling and agreed to permit Respondent to question Petitioner as to whether he was receiving railroad benefits (R 235-236). Upon receiving Petitioner's affirmative answer, the Court meticulously advised the jury that they could con-

sider the evidence *not* to diminish damages, *not* on the question of the railroad's negligence, *not* in connection with any of the special issues they were to answer, but solely for the purpose of determining Petitioner's credibility.[7] There was no claim at the time that this instruction was not wholly adequate, and there is none now.

The admission of this evidence was proper—certainly so with its effect thus stringently limited by the court's instructions. It was for the jury to resolve the conflicting testimony as to the extent of Petitioner's disability. To assist them, they were entitled to consider, under proper instructions, information tending to show that Petitioner had not told the truth when he said he was too badly hurt to work, that the real reason he was unemployed was that he was receiving a pension and did not have to work.

Contrary to Petitioner's assertion (Petition for Certiorari, page 10) there is no conflict between the Courts of Appeal on this point. All but one of the cases cited by Petitioner are

[7] "The Court:

"Members of the Jury: I want to explain to you, and I know you will follow my words carefully and my instructions. This is admitted solely for the purpose of attacking the credibility of this witness. You may not, and I know you will not, diminish any damages you may find he is entitled to, if you do, by reason of this fact, because it is no defense to one of these cases that he has other means of paying him, and this Railroad Retirement Act is a social one, whereby one employer and employee contribute to a fund to take care of disabled employees, and it doesn't relieve them of any responsibility, and you won't consider it as relieving them of any responsibility whatever, and it doesn't bear on the question of whether the railroad was negligent or whether they caused the accident or not, and it doesn't bear on the amount of damages that can be given to them, but solely for the purpose, as they offered it, of attacking this witness' credibility. That means, as I will instruct you, believability of his testimony that he didn't receive wages or that he didn't work because of the injury that he got, so I think you understand it plainly enough. As to the issues that will be asked you, it has no bearing at all. You are going to be called on to answer special issues, and it is not material to any of them. Go ahead." (R. 236 237.)

concerned with whether the defendant, to mitigate the damages, may introduce evidence that the plaintiff has been receiving collateral benefits, such as insurance payments or a pension. None of these cases even suggests that when such evidence tends seriously to reflect upon the plaintiff's testimony as to a material matter, it cannot be used to impeach him. On the contrary, the established rule is that it is within the trial court's discretion to permit evidence, inadmissible on the general issue, to be used for impeachment. *Sprinkle v. Davis, 4 Cir. 1940, 111 F. 2d 925, cert. den., 1941, 314 U. S. 647, 62 S. Ct. 90, 86 L. Ed. 519; Inter-Ocean Casualty Co. v. Brockman, 5 Cir. 1941, 123 F. 2d 1006, cert. den., 1942, 315 U. S. 816, 62 S. Ct. 805, 86 L. Ed. 1214; Bank of Edenton v. U. S., 4 Cir. 1945, 152 F. 2d 251.* "In this frequently arising situation, the normal practice is to admit the evidence. The interest of the adversary is to be protected, not by an objection to its admission, but by a request at the time of the offer for an instruction that the jury is to consider the evidence only for the allowable purpose." *McCormick on Evidence 1954, Sec. 59.* In *Reiner v. Northern Pacific Term. Co. of Oregon, 9 Cir. 1958, 259 F. 2d 438,* the only case in point cited by Petitioner, the Ninth Circuit reach the same result as the court below, holding that the evidence was admissible for the limited purpose of impeachment because the plaintiff had "contended that he was completely incapacitated by reason of the accident and could not work," and the defendant was "endeavoring to show by way of impeachment that the reason he didn't work was not because of the accident, but because he was retired."

In any event, the evidence could not have affected the adequacy of the damages, because, the liability issues having been decided in favor of Respondent, the damage issue was never even answered. *Reiner v. Northern Pacific Term. Co. of Oregon, 9 Cir., 259 F. 2d 438.* Any error in admitting the evidence could not, therefore, have affected the rights of the parties. Even if the Court of Appeals had decided that the testimony should not have been received, it could not have reversed the case on account of a harmless error. *Rule 61, Federal Rules of Civil Procedure.*

"Rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers' Liability Act." *Lavender v. Kurn, 1946, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916.* Inasmuch as there was a sharp conflict as to whether Petitioner was disabled, the evidence was highly relevant to the truth of his testimony on this issue, and appropriate instructions accompanied its admission, it cannot be said that the district court abused its discretion in receiving the evidence for the limited purpose for which it was offered. Certainly, no basis exists for the granting of certiorari to review the district court's exercise of its discretion in the proper application of this long-established principle of law. *Rule 19, Revised Rules of the Supreme Court of the United States.*

CONCLUSION

The decision of the court below was correct. Petitioner has failed to show that the case involves any novel or unsettled

principles of law or any issues of sufficient importance to command the time of this Court.

Respondent respectfully submits that Certiorari should be denied.

JACK PEW, JR.

D. L. CASE

Of Counsel:

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CERTIFICATE OF SERVICE

I, D. L. Case, one of the counsel for Respondent Union Terminal Company, certify that on the 26th day of September, 1961, a copy of the above and foregoing Brief was mailed by first class postage prepaid to J. O. Bean, Counsel of Record for Petitioner 710 Gulf States Building, Dallas 1, Texas.

D. L. CASE

APPENDIX A

Opinion of the Court of Appeals

OPINION OF THE COURT—FILED MAY 9, 1961

In the

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 18320

JIM SIMMONS,

Appellant,

versus

UNION TERMINAL COMPANY,

Appellee.

Appeal From the United States District Court for the Northern District of Texas.

(May 9, 1961)

Before CAMERON and BROWN, Circuit Judges, and HANNAY, District Judge.

PER CURIAM: In this personal injury action under the Federal Employers' Liability Act, 45 U. S. C. A. § 51 et seq., the appellant, against whom a jury verdict was returned, assigns three errors as requiring reversal: that the employer failed as a matter of law to furnish a reasonably safe place for appellant to work; that the court erred in submitting the case to the jury under a "special issue charge," and that the

court erred in admitting, for impeachment purposes, evidence that appellant was receiving Railroad Retirement Benefits. We do not think that the appellant has shown that the court committed reversible error in any of the particulars argued.

Aside from the fact that appellant made no motion or request for a directed verdict in his favor, see *Seaboard Air Line R. Company v. Horowitz*, 5 Cir., 1960, 277 F. 2d 738, there was a clear conflict in the evidence between appellant's version and that of an eye witness to the occurrence. Appellant's version was that the express truck causing his injury was permitted by the appellee to be placed by the express company upon a sloping ramp, unattended and without brakes; and that the appellee breached several duties owed to him such as failing to furnish a level ramp, to keep a proper lookout for the appellant, and failing to warn the appellant of the likelihood that the truck would move.

Appellee's evidence, however, disagreed directly with that of appellant. The express company's employee of fifteen years, one Coleman, testified that he had just parked the truck which injured appellant; that he had placed it so that it was headed into a post and could not move unless someone changed its position; that immediately before his injury, the appellant pulled the truck from behind the post and cut the wheels so that gravity would propel it toward the ramp edge; and that, seeing the truck rolling towards the edge of the ramp, appellant seized hold of it and was jerked by it over the edge of the ramp. It was undisputed that the ramp had a slope of two or three inches to each side of the center

so that water would drain from it and keep it from being slippery and dangerous; and that such a construction was necessary and proper.

The jury was called upon to decide which of the stories it would believe, and there was ample credible evidence to warrant its special finding that neither the express company nor appellee left the truck unbraked and in a position to move by its own weight; and that the appellee was guilty of no negligence which proximately caused appellant's injuries.

After giving a charge defining in general terms the duty owed appellant by the appellee, the trial court propounded seven special issues to the jury. This procedure conformed precisely to the provisions of Rule 49, F.R. Civ. P., 28 U. S. C. A., and the questions asked were fairly put and the required answers covered the issues framed by the pleadings. The appellant did not object to the form or contents of the questions constituting the special issues, and did not object to the charge given by the court below or except to its failure to give the one charge requested by appellant, as required by Rules 49-51, F.R. Civ. P. And see generally *American Fidelity and Casualty Company et al. v. Drexler*, 5 Cir. 1955, 220 F. 2d 930, and *Clegg v. Hardware Mutual Casualty Co.*, 5 Cir., 1959, 264 F. 2d 152.

The court permitted appellee, upon its recall of the appellant to the witness stand at the conclusion of his evidence, to ask appellant if it was not true that he had received eighty dollars every two weeks as benefits under the Railroad Sickness and Disability Act. The evidence was offered by the appellee only for purposes of impeachment, and the

court carefully explained to the jury that it was received solely for consideration by them on the question of whether it tended to impeach the testimony given by appellant as a witness for himself. The court had initially ruled that the question would not be permitted, and changed its ruling only after appellant had given testimony which the court thought was at variance with that so introduced in rebuttal concerning the payments under the Railroad Sickness and Disability Act. We think that, as handled and limited by the court below, the evidence was not prejudicial and that its admission was within the discretion of the trial court. *Reiner v. Northern Pacific Terminal Co. of Oregon*, 9 Cir., 1958, 259 F. 2d 438. And cf. *Dunham v. Pannell*, 5 Cir., 1959, 263 F. 2d 725 and *Schybinger v. Interlake Steamship Company*, 7 Cir., 1959, 273 F. 2d 307.

It appearing that no reversible error was committed by the court below, the judgment appealed from is AFFIRMED.

APPENDIX B

Rule 49(a), Federal Rules of Civil Procedure

Rule 49. Special Verdicts and Interrogatories

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have a finding in accord with the judgment on the special verdict.

APPENDIX C

Charge of the Court and Verdict.

Members of the Jury: The plaintiff has brought this suit relying on a federal statute known as the Federal Employers Liability Act, which provides in part as follows:

"Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works or other equipment."

This Act does not make the employer the insurer of the safety of its employees while they are on duty. The basis of its liability is its negligence not the fact that injuries occur. And that negligence must be in whole or in part the cause of the injury.

"Negligence" is a failure to exercise ordinary care, and ordinary care means such care as a person of ordinary prudence would exercise under like or similar circumstances.

You are instructed that the fact alone that an accident occurred does not mean that it was proximately caused by anyone's negligence, as those terms are defined herein.

An "unavoidable accident" is an occurrence which happens without any causal negligence on the part of either the plaintiff or the defendant, that is, something which happens

unexpectedly and in spite of the fact that no lack of ordinary care by either party, or both parties, has brought it about.

"Contributory negligence" means negligence of one party which concurs or combines with the negligence of another party to become the proximate cause of the particular event.

A. "proximate cause" is an act or an omission which naturally, and in a connected sequence, leads to certain consequences which are such that a person of ordinary prudence, under all of the circumstances, should have reasonably foreseen the same or similar consequences as a result of said cause.

A given event may result from more than one proximate cause or from only one proximate cause. When the event results from only one proximate cause, that proximate cause is called the "sole proximate cause". That is to say, "sole proximate cause" means the only proximate cause of an event.

A "proper lookout" is that type and character of lookout which an ordinarily prudent person would have kept under the same or similar circumstances.

"Preponderance of the evidence" means the greater weight or degree of credible proof admitted in the case.

You are the exclusive judges of the facts proven, the credibility of the witnesses and the weight to be given their testimony, but you are bound to receive the law from the Court as stated herein and be governed accordingly.

Now, bearing in mind the foregoing instructions, as well as further directions later given in this charge or orally you

will return herein answers to the following Special Issues, or to such of them, as may be necessary, according to specific explanations in connection with said issues, to-wit:

Special Issue No. 1: Do you find from a preponderance of the evidence that the accident in question was not the result of an unavoidable accident?

Answer: "It was the result of an unavoidable accident"
or

"It was not the result of an unavoidable accident".

Answer: "It was not the result of an unavoidable accident."

If you have answered the foregoing, Special Issue No. 1 "It was not the result of an unavoidable accident", but only in that event, then answer the following Special Issues, or such of them as may be necessary according to specific explanations in connection with said Issues.

Special Issue No. 2: Do you find from a preponderance of the evidence that an employee of the Railway Express Agency, Inc., in the performance of his tasks for his employer, Railway Express Agency, Inc., left the Express truck unbraked and in a position to roll and that such acts or omissions of the Railway Express Agency, Inc., and its employee were the sole proximate cause of the accident and injuries in question?

Answer: "Yes" or "No".

Answer: "No".

You are instructed that it is the non-delegable duty of the employer, Union Terminal Company, to exercise ordinary care in furnishing its employee Jim Simmons a reasonably safe place to work.

If you have answered the foregoing Special Issue No. 2 "No", but only in that event, then answer the following Special Issues, or such of them as may be necessary according to specific explanations in connection with said Issues.

Special Issue No. 3: Do you find from a preponderance of the evidence that the defendant Union Terminal Company was guilty of negligence which in whole or in part was a proximate cause of the accident in question in any one or more of the following respects:

(a) In failing to furnish the plaintiff a reasonably safe place to work by permitting an Express wagon to be parked on the sloping ramp of its premises in a position to roll.

Answer: "Yes" or "No".

Answer: "No".

(b) In failing to furnish the plaintiff a reasonably safe place to work by permitting the Railway Express Agency, Inc., employees to use the ramp on the premises where the plaintiff Jim Simmons was required to work, for operating and parking Express trucks?

Answer: "Yes" or "No".

Answer: "No".

If you have answered Special Issue No. 3 or any part thereof "Yes", but only in that event, then answer Special

Issue No. 4 and the following Special Issues or such of them as may be necessary according to specific explanations in connection with said Issues.

Special Issue No. 4: Do you find from a preponderance of the evidence that the plaintiff Jim Simmons was guilty of negligence which was a proximate cause of the accident in question in any one or more of the following respects:

(a) In failing to keep a proper lookout for his own safety.

Answer: "Yes" or "No".

Answer:

(b) In moving and leaving the Express truck on the ramp in a position to roll?

Answer: "Yes" or "No".

Answer:

(b) In moving and leaving the Express truck on it would not roll onto an adjacent railroad track after the truck started rolling and in so doing getting down off of the concrete platform?

Answer: "Yes" or "No".

Answer:

If you have answered Special Issue No. 4 or any part thereof "Yes", but only in that event, then answer the following Special Issue No. 5.

Special Issue No. 5: Do you find from a preponderance of the evidence that the acts, or omissions, singularly or col-

lectively, of the plaintiff Jim Simmons, constituting negligence and a proximate cause of the accident in question, were the sole proximate cause of the accident and injury in question?

Answer: "Yes" or "No".

Answer: .....

If you have answered Special Issue No. 4 "Yes" and you have also answered Special Issue No. 5 "No" and only in that event, then answer the following Special Issue No. 6.

Special Issue No. 6: From a preponderance of the evidence what percentage of the cause of the accident did plaintiff Jim Simmons' negligence contribute? Answer ..... %.

If you have answered Special Issue No. 3 or any part thereof "Yes" and you have either not answered Special Issue No. 5 or unanswered Special Issue No. 5 "No", and only in those events, then answer the following Special Issue.

Special Issue No. 7: What sum of money, if any, if paid in cash now do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff, Jim Simmons, for the injury, if any, sustained by him on December 21, 1957, as a direct and proximate result of the accident in question if any?

Answer by stating the amount in dollars and cents.

Answer: .....

You are instructed that you may take into consideration the following elements and factors or such of the same, if any, as are proven, and no other:

(1) Reasonable and necessary doctor's, hospital and medical expenses incurred in the past and which in reasonable probability will be incurred in the future,

(2) Physical and mental pain and suffering of plaintiff which he has suffered in the past, and in reasonable probability will suffer in the future,

(3) Lost earnings in the past and decreased ability to earn money in the future,

which plaintiff has in reasonable probability sustained as a direct and proximate result of the accident in question.

It is demanded by justice, and provided by law, that one who has injured another may be held liable for the damages resulting from his acts and not for injuries attributable to prior causes. Hence, where injuries occasioned by a defendant's conduct simply aggravated or increased an existing condition, disorder or disease, the plaintiff is entitled to recover only for the increase or aggravation of the ailment or infirmity; thus, plaintiff's damages being limited to the amount of damages sustained by the plaintiff by reason of the agumentation of his injury and suffering, you will not consider or allow anything for the pain and suffering, or for the lost or diminished capacity to work and earn money, or for medical or hospital expense because of so much of plaintiff's

damages, if any, that was not an aggravation of his prior condition caused by the injuries received in the accident in question.

This case, like any other, is to be decided by you fairly and calmly, with careful, honest and conscientious consideration given to the evidence admitted under the rulings of the Court in the trial. In weighing the credibility of the witnesses and the weight to be given their testimony, you may take into consideration the interest and motive that may have prompted each and all of them to testify in the manner in which they testified. Do not let bias, prejudice, sympathy, resentment or any such emotion play any part in your deliberations; or speculate on matters not shown by the evidence.

You will now retire, elect your foreman, and deliberate upon your verdict. Your foreman will sign your verdict.

(S.) JOE E. ESTES,
United States District Judge.

Verdict of the Jury.

We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return the same into Court as our verdict.

(S.) ANDREW J. OSBORNE,
Foreman.

APPENDIX D

(Discussion Between Court and Counsel Concerning Charge)

(February 16, 1960. The following proceedings were had outside of the presence of the jury.)

The Court:

Any objections from either side of the table?

Mr. Bean:

No objections from this side. I do have two requests to make.

The Court:

The plaintiff.

Mr. Bean:

It may be, Your Honor, that my requested instructions, which I brought up here at pre-trial, will cover this but at no place in the charge do I find where the Court has submitted the proposition to the jury as to whether or not the common carrier employer failed to exercise ordinary care in furnishing him a reasonably safe place to work. That is the ultimate issue in an FELA case held by the Supreme Court in many cases, and as requested in my special general charge.

The Court:

Well, I am not going to give a general charge in this case.

Mr. Bean:

Plaintiff excepts to the Court's charge for that reason.

The Court:

All right.

Mr. Bean:

That submitting it in special issue form takes away the liberal provisions of the Federal Employers Liability Act. Also, Your Honor, I wish to object to—may I see that now? Specifically, I am objecting because there is no submission of an issue on unsafe place.

The Court:

All right.

Mr. Bean:

Issue two. Now, Your Honor mentioned this yesterday, whether or not it would be necessary to submit negligence, on whether or not someone else's conduct was a sole proximate cause.

The Court:

Yes.

Mr. Bean:

And I more or less agreed with that.

The Court:

Yes.

Mr. Bean:

I read many lawsuits since that discussion yesterday afternoon, and I beg permission to respectfully object to the submission of that issue without the incorporation of an issue

on negligence. I find no case where it has been submitted as a defense except prefaced on the negligence of some third party.

The Court:

Uh-huh.

Mr. Bean:

And I think negligence should be submitted. Understand, I am not sure of my ground, but I have not found a case submitted on sole proximate cause unless it be the negligent act of some other person, and for the further reason—object to Special Issue No. 2 for the reason, under the FELA Act, it is a non-delegable duty of the common carrier to furnish a reasonably safe place for its employee to work, and in this case, as alleged, the bare permissive use of the third party or the Railway Express Agency of the premises of the Union Terminal Company, even if the Express Company's employees were negligent in leaving that truck there, this Union Terminal Company is responsible for that act where it has control of its premises and has not surrendered complete control over to the Railway Express Agency, in performance of the non-delegable duty.

The Court:

I understand, but you are talking about law. The only facts upon which you rely to show that the defendant failed to furnish the plaintiff a reasonably safe place to work are in permitting an Express wagon to be parked on the sloping ramp of its premises unattended and without the application of brakes and in permitting the Railway Express Agency,

Inc. employees to use the ramp on premises where the plaintiff, Jim Simmons, was required to work for operating and parking Express trucks. Now, since those are the only facts on which you predicate negligence, the submission of those facts to the jury if they find either one of them in your favor, that will in law amount to a failure to furnish a reasonably safe place to work.

Mr. Bean:

That may be true, Your Honor.

The Court:

So I am not going to submit this case on a general charge, and so that is the only issue to submit to the jury in a special issue submission of the facts.

Mr. Bean:

Well, what I have in mind and the objection I am trying—

The Court:

Those are the bases of your claim of failure to furnish a reasonably safe place to work, so since they are, they must be negligence, and so—

Mr. Bean:

Sure.

The Court:

—and so you have got the jury fairly charged here under the law.

Mr. Bean:

What I have in mind and what I am thinking about—

The Court:

I know what you are thinking. I agree with you about what is the law, but we don't submit the law to the jury.

Mr. Bean:

The Bailey vs. Central Vermont Railway, Inc. case, I believe it is 63 Supreme Court Reporter, where a car was parked over a bridge and being unloaded by an employee and on a narrow ramp, and the Court held that they take in consideration every element and one element as related to the other, the width, the space, the lighting, the height and everything, and submitting the issues as you have given them, Your Honor, it just occurs to me that it doesn't include every element that the jury might consider down here as to space, as to height, as to elevation. Now, it does include permissive use of the Railway Express Agency truck, things like that. That is why I seek to object to it, Your Honor.

The Court:

All right. Objection will be overruled.

Mr. Bean:

Now, on Issue No. 3--and I don't know, I may be kind of befuddled here, but the more I work on these FELA cases, the more conscious I am of the fact that the plaintiff does not get the submission of the very liberal provisions of the law. Again I am going back to the law.

The Court:

Yes. We don't submit the law to the jury. Go ahead, Counsel.

Mr. Bean:

And I am objecting to Special Issue No. 3, if I caught it correctly as Your Honor was going over it in sections (a) and (b).

The Court:

All right.

Mr. Bean:

Because there is no submission on negligence in part or proximate cause in part, but it is submitted under the general theory of negligence under a common law rather than under the provision of the Federal Employers' Liability Act.

The Court:

I will insert there "was guilty of negligence which in whole or in part was a proximate cause", negligence which in whole or in part was. I will be glad to put that in, "which in whole or in part was a proximate cause of the accident in question". Now, that catches that.

Mr. Bean:

Your Honor.

The Court:

Yes.

Mr. Bean:

I am not sure about this. I wish to point out that under the Act, not only should negligence be submitted in whole

or in part but was a proximate cause in whole or in part. Now, that "a proximately cause—"

The Court:

Oh, that hasn't been substituted. I don't have any objection to putting "which was in whole or in part". That answers it, though.

Mr. Bean:

Yes.

The Court:

Negligence in whole or in part was a proximate cause.

Mr. Bean:

You have got more than one proximate cause.

The Court:

Yes, a proximate cause. Yes, that is in the issue. All right.

Mr. Bean:

And plaintiff excepts to the submission of a Special Issue No. 4, subsections (a) and (b), for the reason that the Court is submitting an issue which is not raised and is in fact up to now without dispute—

The Court:

Well, wait just a minute.

(Discussion off of the record.)

Mr. Bean:

May I point out on section (a) of Issue 4 and object to it for this reason because I don't think they will have any proof that he could have done anything about braking or applying the brakes to the truck because the proof will show that it was not equipped with brakes and putting an undue burden on the plaintiff more than that which is required by law. I am just presupposing what the testimony will be and it will be to this effect, and it will be that that truck was not equipped with brakes, and therefore, the plaintiff cannot be charged with the duty of applying the brakes. No further objections.

The Court:

All right.

Mr. Bean:

Let me see. Just this general statement. I don't know whether I am able to express myself clearly or not. I just feel that the plaintiff in one of these cases is entitled to go to the jury on any conduct of its employer controling the premises, whether some third party comes in there or not, and I base that on the Arnold case where there was a construction of a driveway being used by a mail truck, and the State Court held that the mail truck was the sole cause under the facts, but the Supreme Court said no, that that was a jury issue, and I am just wondering in my confused mind if we do have submission of every element.

The Court:

Just a minute.

(Discussion off of the record.)

Mr. Case:

I think that the Court's charge fairly covers the case. I have only one issue that properly is raised under the evidence and pleadings, and that is the plaintiff's failure to keep a proper lookout.

The Court:

Yes. I will just add that on there. I will make that (a).

(Discussion off of the record.)

Mr. Case:

And I would request the Court to give this charge, or the substance of it, in connection with the damage issue.

The Court:

All right. I will overrule that.

Mr. Bean:

May I request additional instruction in view of the submission of the sole proximate cause issue?

The Court:

All right.

Mr. Bean:

Conduct of some other, and request that it be added under the instructions under Special Issue No. 2 in this connection: You are instructed that it is the nondelegable duty of the employer, Union Terminal Company, to exercise ordinary care in furnishing its employee, Jim Simmons, a reasonably safe place to work.

The Court:

I will add that instruction. That is all right.